

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

436

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

23,175.

EUGENE R. CLARK,

Appellant

-VS-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 20 1969

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STATUTES INVOLVED

Title 14, District of Columbia Code, Section 305 (77 Stat. 519):

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers to such matters. To prove the conviction of crime, the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.

REFERENCES AND RULINGS
RULES INVOLVED

Rule 6(f), Fed. R. Crim. P.

An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the Grand Jury to a judge in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

ISSUES PRESENTED

- I. THE INDICTMENT RETURNED AGAINST APPELLANT VIOLATES RULE 6 FED. R. CRIM. P. AND THIS VIOLATION HAS DENIED APPELLANT DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT.
- II. TRIAL COUNSEL FAILED TO PRESENT RELEVANT EVIDENCE IN CORROBORATION OF APPELLANT'S STORY AND THIS FAILURE HAS DENIED APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT.
- III. THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE EVIDENCE WAS INSUFFICIENT TO TAKE THE CASE TO THE JURY.
- IV. ALLOWING IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTIONS WAS AN ABUSE OF DISCRETION UNDER TITLE 14 DISTRICT OF COLUMBIA CODE, SECTION 305 AND OF THE CRITERIA SET OUT IN LUCK v. UNITED STATES.

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT UNDER THE SAME OR ANY SIMILAR TITLE.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

23,175

EUGENE R. CLARK,

Appellant

-vs-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The Appellant, Eugene R. Clark, was indicted for offenses under Title 22 District of Columbia Code, Section 2204 and 10 United States Code, Section 2312. The jury returned a verdict of guilty as charged; and upon this conviction, the appellant was sentenced to imprisonment for a period of not less than one nor more than four years on each count to run concurrently. The jurisdiction of this court was invoked under Title 28 United States Code, Section 1251.

STATEMENT OF THE CASE

On July 3, 1965 a 1965 Ford Mustang convertible owned by Herbert P. Campbell was stolen while parked at First and Eye Streets, N. W. Washington, D. C. On July 26, 1965, appellant was involved in an automobile accident in Philadelphia, Pa. while operating the said 1965 Ford Mustang convertible. Appellant was arrested, tried, and convicted in the United States District Court for the District of Columbia on August 2, 1967 for the unauthorized use of a motor vehicle and interstate transportation of a stolen motor vehicle. Appellant was sentenced on May 1, 1968.

The automobile was taken without permission (Tr. 51) from its parking place in the District of Columbia (Tr. 58) by a person unknown to the owner (Tr. 63) sometime between 12:30 am (Tr. 57) and 8:00 am on July 3, 1965 (Tr. 58). The owner immediately notified the police who testified that a report had been filed on July 3, 1965 (Tr. 77). The automobile in question was a red and white 1965 Ford Mustang convertible with Virginia license plates (Tr. 54) which contained in the glove compartment, registration cards issued by Virginia (Tr. 55) and Maryland (Tr. 56) and which had a plate on the inside left hand door panel containing a serial number 5F0-6536 (Tr. 60).

The owner testified that he could identify the car involved in the accident in Philadelphia on July 26, 1965 as his car by comparing a photograph of that car's identification plate on the inside door panel with his registration card (Tr. 67-68) although the car in the photograph was shown in other photographs to be damaged (Tr. 37) and to bear Oregon license plates (Tr. 3.).

Mr. Harry Rogers, an employee of Bainbridge Auto Body, Philadelphia, testified that he happened upon an accident in Philadelphia on the 26th of July, 1965 involving the red 1965 Ford Mustang and offered to repair the damage (Tr. 2). He arranged with the driver or owner, identified as appellant (Tr. 34) to have the Mustang taken to his employer's garage and in the course of making these arrangements appellant signed two "loss reports" a first in the name of Eugene Clark and a second in the name of Souders (Tr. 33). The Mustang had Oregon tags (Tr. 36).

Mr. Rogers testified further that after receiving the car it was held about six months and repaired (Tr. 42) and that sometime during that period a man called Souders telephoned a couple of times and said he would send money but that he had no insurance (Tr. 38). Mrs. Marquita Rogers, wife of Harry Rogers, testified she was with her husband on July 26, 1965 and observed substantially the same events.

In November 1965 Detective Frank Stewart of the Philadelphia Police Dept. investigated a missing 1965 red Mustang convertible reported missing from Washington, D. C. (Tr. 70). The investigation was at the request of Detective Harold Burwell of the Washington Police Department and led Detective Stewart to Bainbridge Auto Body in Philadelphia. He found a car fitting the missing auto report and searched the glove compartment where he found registration cards with Herbert Campbell's name and a bill with Eugene Clark's name (Tr. 71) and other papers with Mr. Campbell's name. He directed that photographs be made including one of the open right side door which contained a metal plate with a number 5F060186506 (Tr. 73). This photograph, Government Exhibit 7, was used by the owner to identify the automobile as his. The appellant conceded placing the bill in the

glove compartment but denied that any registration cards had been present in the glove compartment. (Tr. 130). Detective Burwell subsequently arrested appellant in this case (Tr. 76).

In explaining his possession of the 1,65 red Ford Mustang convertible, appellant testified that Willie Frank Barnes was an acquaintance of appellant from Camden, N. J. who was in the service (Tr. 106) stationed in Oregon during July, 1965 (Tr. 10.) he was visiting in Baltimore. Barnes came to see appellant sometime between the last part of June, 1,65 (Tr. 123) and the 4th of July, 1,65 (Tr. 120) and upon that visit was in possession of a 1,65 red Ford Mustang convertible. Presumably, Barnes could not drive the car since he had a cast on at the time (Tr. 10.) and so to repay an \$80.00 debt owed by Barnes to appellant (Tr. 100) he offered appellant the use of the Mustang while he was in Oregon (Tr. 10.). At that time Barnes had a registration on the auto for Oregon (Tr. 10.) and apparently also had a Ford owner's manual with Willie Frank Barnes' name thereon. (Tr. 132) which appellant left in the car when he left it at Bainbridge (Tr. 132).

Appellant had a valid District of Columbia operator's permit which had been impounded by a U. S. Commissioner in Greenbelt, Maryland for traffic violations sometime prior to his receiving the Mustang from Barnes (Tr. 110). Therefore, when operating the Mustang he generally carried an operator's permit issued to a Mr. Souders. This permit of Souders had been found by appellant's friend Jessie Coles and had been given to appellant by Mr. Coles (Tr. 11). Mr. Coles and appellant were good friends who were frequently together in the Mustang during July, 1965.

During that period, Mr. Coles was told by appellant that a friend named Sunny had loaned him the car while Sunny was in the service in Oregon (Tr. 10). Mr. Coles was with appellant on July 10, 1965 when they were arrested in the District of Columbia for traffic charges. At the time of the arrest in July, 1965 the Washington Police Department investigated the possibility of the 1965 Ford Mustang driven by appellant being a stolen vehicle and had no report of its being stolen (Tr. 115). Mr. Coles also accompanied appellant on July 13, 1965 on a trip to New York at which time they received a motel bill which was subsequently discovered by Detective Stewart in the glove compartment of the automobile at Bainbridge Auto Body (Government Exhibit 5-Tr. 75).

After the accident in Philadelphia, appellant returned to Washington and notified Mr. Barnes that the automobile was in Philadelphia. (Tr. 132) and Mr. Barnes stated he would take care of the automobile. (Tr. 132). Upon receiving this assurance appellant left Washington and assumed that Mr. Barnes had taken care of the car.

Willie Frank Barnes never got the car from Bainbridge Auto Body. In fact, appellant did not see or hear from him until shortly before his trial when he discovered that Barnes had died in Baltimore after being stabbed by his wife. (Tr. 137). Therefore, appellant was unable to obtain the corroboration of his story from Mr. Barnes although Mr. Coles did testify that in substance he had been told the same story in July, 1965.

On September 7, 1966 appellant was presented by the Grand Jury which presentment was filed in open court along with his Indictment on September 12, 1966. At arraignment on September 23, 1966 appellant, represented by court-appointed counsel, Raymond Rabin, Esq. entered a plea of

not guilty and \$1000.00 bail was set. A pro se application to proceed in forma pauperis was filed along with a Motion for Release on Personal Recognizance on October 7, 1966. After argument by Mr. Rabin on October 21, 1966, the application and motion were granted by order of Judge Bryant on October 21, 1966. Appellant was allowed to remain free on personal recognizance until it was revoked by order filed July 18, 1967.

During the trial of this case, a conference held out of the presence of the jury led to a discussion of appellant's prior record. Mr. Rabin requested that use of appellant's prior convictions be excluded for impeachment and represented that appellant probably did not have any chance to submit a defense unless he testified. (Tr. 34). After some discussion of various prior charges, the trial judge allowed the Government to question the defendant about a conviction of larceny in April 1959 and one in September, 1962 but precluded use of "the other" (Tr. 36) and precluded mention of the fact that automobile larceny was involved in at least one of those prior offenses (Tr. 35). The trial judge, citing the Luck, Brown, and Brooke cases reasoned that prior offenses relating to dishonesty were properly used (Tr. 36) and that it was not proper to give the appearance of non-involvement in prior offenses (Tr. 35). The trial judge stated in addition that the use of crimes to impeach a defendant should not be used to indicate a propensity for crime (Tr. 35). There is no indication of what the precluded "other" was although there was testimony at trial of traffic offenses in which appellant had been arrested (Tr. 111 and 123). Subsequently, appellant was questioned on cross-examination concerning a conviction for larceny in April of 1959 in Trenton, N. J. and attempted petty larceny in September 1962 in Rikers Island, N. Y. (Tr. 133).

During trial, defense counsel moved for a directed verdict at the close of the government case in chief (Tr. 82) which was denied since the trial judge was of the opinion that a prima facie case had been made (Tr.82). The motion was renewed at the close of the defense and again denied (Tr. 146).

After being convicted on August 8, 1967, appellant was permitted by Judge Gasch to remain on bond pending sentencing. After sentencing on May 3, 1969, appellant filed his Appeal on May 9, 1969 and pursuant to a finding that appellant was financially unable to obtain counsel, Judge Bazelon by order filed June 19, 1969 appointed Robert V. Schnabel, Esquire, to represent appellant and Judge Wright by order filed July 14, 1969 appointed Douglas William Morrison as co-counsel. After Mr. Morrison requested the order be vacated, Judge Wright vacated the order and appointed John J. F. Mathews, Esquire as co-counsel by order filed August 6, 1969.

SUMMARY OF ARGUMENT

I. Due process of law requires that indictments be returned in accordance with Rule 6, Fed. R. Crim. P. and due process was denied in this case because the presentment does not agree with the indictment and this denial should not be excused by balancing against hypothetical loss of constitutional rights by others.

II. Effective assistance of counsel requires that evidence of a key defense witness's death and of other facts corroborating the defense be presented.

III. A directed verdict of acquittal should have been granted where the evidence equally supports an inference of guilt or of innocence due to conflicting theories.

IV. The Trial Court abused its discretion by allowing the use of prior convictions for impeachment without inquiring as to the length of appellant's prior record or as to the remoteness and circumstances surrounding the prior convictions. Since the death of a key witness made appellant's unimpeached testimony essential to his defense.

ARGUMENT

POINT 1.

DUE PROCESS OF LAW REQUIRES THAT INDICTMENTS BE RETURNED IN ACCORDANCE WITH RULE 6, FED. R. CRIM. P. AND DUE PROCESS WAS DENIED IN THIS CASE BECAUSE THE PRESENTMENT DOES NOT AGREE WITH THE INDICTMENT AND THIS DENIAL SHOULD NOT BE EXCUSED BY BALANCING AGAINST HYPOTHETICAL LOSS OF CONSTITUTIONAL RIGHTS BY OTHERS.

Following the indictment procedure used in the District of Columbia, the Grand Jury after hearing testimony of the Government presented appellant to the United States District Court for the District of Columbia on September 7, 1966. The presentment was signed by Theresa B. Danley as Foreman and filed in open court on September 12, 1966 charging "unauthorized use of a vehicle, 18 USC 2312."

Thereafter, the U. S. Attorney drew an indictment which contained specifics of two counts--unauthorized use of a vehicle, 22 D.C. Code 2204, and interstate transportation of stolen motor vehicle, 18 US Code 2312. The Grand Jury did not in the normal course of events concur in the specifics of the indictment but the indictment was signed "A TRUE BILL" by Theresa B. Danley and filed in open court on September 12, 1966.

This Court has held that this procedure violated Rule 6, Fed. R. Crim. P.; Gaither v U.S. __ U.S. App. D.C. __, __ F.2d __, No. 21730, 22148, 21364, 37 W.L.R. 74 (April 3, 1966). However, on rehearing this Court refused to make the decision retroactive in cases other than the Gaither and Tatum cases under consideration therein; Gaither v U.S., __ U. S. App. D.C. __, __ F.2d __; No. 21730, 22148, 21364, 37 W.L.R. 365 (May 21, 1969). On rehearing, retroactivity was denied due to the delay which would allegedly result in the U.S. District Court due to holding hearings in all pending cases which contained defective indictments. In adopting its prospective ruling the Court noted with apparent approval the like practice of the Supreme Court which in like cases has relied on the "Case and Controversy" requirement of Article III of the Constitution and on the need to promote changes in the law in individual cases. This Court adopted a prospective only application of the Gaither rule by noting that a balance of the admitted denial of due process in Gaither situations is less important than the possible denial of speedy trials to those individuals whose trials would be delayed due to reconsideration of the Gaither issue in pending indictments.

Even though this case, wherein an indictment was returned on September 12, 1966 and a conviction found on August 3, 1967, was not a pending case under consideration in the first Gaither decision or the second Gaither decision, it is submitted that denials of constitutional rights which have in fact occurred cannot properly be balanced against possible future denials of constitutional rights. The end result of the Gaither cases was that as to indictments returned after April 3, 1966,

the indictment would be summarily dismissed unless it appeared that the Grand Jury had in fact concurred in the indictment rather than in the presentment only. The reasoning was that it would not be possible to handle all the work which would result if the rule were made retrospective even in part.

Appellant submits that in this case the presentment can be read as specifying a single count and that count may not be the offense charged in the indictment. On its face the indictment differs from the presentment and no presumption of concurrence can be raised. In view of this apparent denial of due process it is not equitable to balance hypothetical losses of speedy trials. Rather the conviction should be reversed as having been obtained by a denial of due process or the case should be remanded for a consideration of the Grand Jury minutes to determine if the Grand Jury would in fact have concurred in the indictment. The alleged tie-up of the District Court is not in fact necessary since modern technology can surely resolve the dilemma; for example, by allowing the court reporters to dictate their notes to a number of stenographers who then can transcribe the minutes for use by a specially assigned judge to conduct the necessary hearings. It does not seem possible to balance an actual denial of a right against any number of possible denials. In summary, since Federal Courts may not decide hypothetical cases *Aetna Life Insurance Company of Hartford, Conn. vs. Haworth, No., 300 U.S. 227, rehearing denied 300 U.S. 687 (1937)*, such cases should not be balanced against this actual denial of a constitutional right and the denial should be remedied.

POINT II.

EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES THAT EVIDENCE
OF A KEY DEFENSE WITNESS'S DEATH AND OF OTHER FACTS
CORROBORATING THE DEFENSE BE PRESENTED.

Appellant submits that under the Sixth Amendment he is guaranteed such assistance of appointed counsel as is necessary to afford him a fair trial; *Anders v. Calif.* 386 U.S. 738, 745 (1967); *Powell v. Alabama*, 287 U.S. 45, 59 (1932); *Brubaker v. Dickinson*, 310 F.2d 30 (9th Cir. 1962). Under this guarantee, a showing of the requisite amount of unfairness in a review of the entire trial establishes ineffective assistance of counsel and will require a new trial. *Bruce v. U.S.* 126 U. S. App. D.C. 336, 339, 379 F.2d 113, 116 (1967); *Mitchell v. U.S.* 104 U.S. App. D.C. 57, 63; 259 F.2d 787, 793, cert. denied 358 U.S. 850 (1958).

Mistakes of counsel should not be held against the indigent client and counsel must produce all available evidence, *Johnson v. U.S.*, 71 U.S. App. D.C. 400, 401, 110 F.2d 562, 563 (1940) and counsel must investigate defendant's story fully, *Campbell v. U.S.*, 122 U.S. App. D.C. 143, 377 F.2d 135 (1965).

In this case defense counsel at trial failed to adequately support appellant's story by failing to produce evidence that Willie Frank Barnes had died and was therefore unable to corroborate appellant's story and by failing to produce evidence that Willie Frank Barnes had owned a 1965 red Ford Mustang which was registered in Oregon in July of 1965 while Barnes was stationed there.

Appellant advised defense counsel at trial that a Willie Frank Barnes had given him the car but at trial appellant testified that Barnes had died and that he had just discovered the fact "this week". In view

of the fact that Willie Frank Barnes was known to be an essential defense witness and in view of the fact that defendant himself could not locate him until he discovered the week of the trial that he had died, effective assistance of counsel would have enabled him to bolster his story by introducing evidence that:

1. Barnes was in fact dead.
2. Barnes was in the service stationed in Oregon during July, 1965.
3. Barnes had owned a 1965 Ford in July, 1965.
4. Barnes had registered a 1965 Ford in Oregon.

Even though Jessie (Rico) Coles was called by the defense and did corroborate appellant's story to the extent that a friend of appellant named "Bunny" had loaned him the car while in the service in Oregon during July, 1965, this was not the most effective manner of proceeding in view of the fact that Barnes himself was dead. The prejudice was particularly apparent since counsel knew of appellant's prior record which would subject him to impeachment or would preclude his testifying in his own behalf.

Therefore, the failure of defense counsel to establish Barnes' death and to show his possession of the car in question amounts to ineffective assistance producing an unfair trial and denying appellant his right under the Sixth Amendment.

POINT III.

A DIRECTED VERDICT OF ACQUITTAL SHOULD HAVE BEEN GRANTED WHERE THE EVIDENCE EQUALLY SUPPORTS AN INFERENCE OF GUILT OR OF INNOCENCE DUE TO CONFLICTING THEORIES.

While Courts of Appeals do not review a jury's findings of fact where the evidence was sufficient for the case to go to the jury, *Sorrels v. Alexander*, 79 U.S. App. D.C. 112, 142 F.2d 769 (1944) the

Court can review the findings of a jury in a case where the evidence was such as to require a directed verdict of acquittal, *Curley v. U.S.* 81 U.S. App. D.C. 389, 160 F.2d 229 (1947). In considering the propriety of a directed verdict this Court stated:

"The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration". *Curley v. U.S.*, supra, at 232-33.

Where an inference must be drawn from proven facts, the evidence is not sufficient to go to the jury when the facts show the possibility of guilt as well as innocence. *Austin v. U.S.*, 127 U.S. App. D.C. 180, 382 F.2d 129 (1967). In the Austin case, a first degree murder charge involving premeditation was considered and the evidence was such as to show the possibility that defendant acted in a state of sustained frenzy as well as the possibility of a calculated, premeditated murder and in such circumstances, this Court held the evidence on premeditation was insufficient for the case to go to the jury.

It is submitted that this case falls within the Austin doctrine in that the facts allow an inference of guilt or of innocence. There was initially conflicting evidence as to whether the car was in fact reported stolen prior to July 19 or 20, 1969. While under arrest on traffic charges, appellant was told by the Washington police that the car he was driving, the car in question, was not reported stolen. However, Herbert Campbell and Detective Burwell testified it was reported stolen on July 3, 1965. Even if it had been reported stolen, appellant had produced an explanation of his possession which was corroborated by Jessie Coles. The conviction therefor rested on the jury's disregard

for the testimony of appellant and Jessie Coles. It is submitted that, since this case rested on an inference of guilt based on unexplained possession and since the defense did in fact explain that possession, reasonable jurymen must have had a reasonable doubt of appellant's guilt and the case should have been withdrawn from the jury.

For these reasons, it is submitted that the trial judge erred in denying appellant's motion for a directed verdict of acquittal.

POINT IV.

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE USE OF PRIOR CONVICTIONS FOR IMPEACHMENT WITHOUT INQUIRING AS TO THE LENGTH OF APPELLANT'S PRIOR RECORD OR AS TO THE REMOTENESS AND CIRCUMSTANCES SURROUNDING THE PRIOR CONVICTIONS. SINCE THE DEATH OF A KEY WITNESS MADE APPELLANT'S UNIMPEACHED TESTIMONY ESSENTIAL TO HIS DEFENSE.

Impeachment of a witness by prior conviction is authorized by Title 14 D. C. Code, Section 305, which states a conviction may be given in evidence to affect his credibility. This Court has granted trial judges discretionary power over the introduction of prior convictions under Luck v. U.S. 121, U.S. App. D.C. 151, 348 F.2d 763 (1965) after the discretionary power is requested by a meaningful invocation, Gordon v. U.S., 127 U.S. App. D.C. 343, 383 F.2d 936 (1967).

Under the Luck doctrine, a trial judge must limit impeachment where the prejudicial effect of introduction far outweighs the probative relevance of the conviction, and the criteria to be used in making such determinations are:

1. The nature of the prior crimes and their relevance to veracity;
2. The length of the criminal record;
3. The remoteness and circumstances surrounding the past convictions; and

4. The necessity for the jury to hear the testimony. *Luck v. U.S.*, supra, at 157, F.2d at 769.

In this case the defense requested that appellant's prior record be excluded and in the exercise of his discretion, there is no reference to any consideration of the length of appellant's record nor of the remoteness and circumstances surrounding the prior convictions. Defense counsel had advised the trial judge that defendant would be denied any chance of establishing a defense unless he took the stand without having his record exposed to the jury.

Here, the length of appellant's record is not established in the trial record beyond the fact that two convictions were allowed in while certain traffic violations were excluded. Thus, it is apparently the case, that the trial judge permitted introduction of all convictions relating to "dishonesty". It is submitted that a proper exercise of discretion would be to reduce the number of convictions which are introduced. Such a procedure was approved by this Court in *Payne v. U.S.*, 125 U.S. App. D.C. 369 F.2d 950 (1966) where one out of twenty-four convictions was allowed in. There is therefore, no evidence that the trial court made any effort to reduce the "length" of defendant's relevant prior record by excluding any prior convictions related to dishonesty. It is submitted that a reduction in length is proper under the Luck case and should have been effected in this case.

Furthermore, the remoteness and circumstances of the convictions herein were not considered. One offense, for attempted petty larceny in 1959 was allowed in although it was 8 years old. This Court has indicated a prior conviction 8 years old was appropriately excluded on a Luck motion, *Carr v. U.S. App. D.C. No. 22373*, decided July 22, 1969 but not yet reported. Additionally, there was absolutely no consideration given to the circumstances surrounding the prior convictions.

For all of these reasons, it is submitted the trial judge did not make an inquiry in conformance with the Luck criteria and therefor abused its discretion in allowing impeachment of appellant. The prejudice is particularly apparent since appellant's key witness was deceased and it was imperative that appellant be permitted to present his explanation without fear of impeachment.

CONCLUSION

WHEREFORE, for the reasons stated above, it is respectfully submitted that the judgment of the District Court be REVERSED.

John J. J. Mathews
Counsel
(Appointed by this Court)
Robert V. Schnabel by JJM

Two copies of this Brief were left on Aug 20, 1969
at the office of the U.S. Attorney.

John J. J. Mathews